UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BRUCE CARPER,	:	**Docket#** 21-cv-05991(EK)(SJB)
Plaintiff,	:	
- versus -	:	U.S. Courthouse Brooklyn, New York
TMC THE METALS COMPANY, INC., ET AL.,	:	
Defendants	:	July 12, 2023 10:47 a.m.

TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT
BEFORE THE HONORABLE ERIC R. KOMITEE
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

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THE COURT: Please be seated.

THE CLERK: Civil Cause for Oral Argument, *In re TMC the metals company, Inc.* securities litigation, docket number 21-cv-5991.

Would you all please state your appearances for the record starting with the plaintiffs?

MR. LUDWIG: Good morning, your Honor. Louis Ludwig on behalf of co-lead plaintiffs Point12 Diversified Fund and Kyle Autry. I'm here with my co-counsel, Joshua Silverman.

MR. SILVERMAN: Good morning.

THE COURT: Good morning.

MR. HAMMEL: Good morning. Jeff Hammel, your Honor, for the defendants. And just do you prefer we sit, stand?

THE COURT: I prefer that you are about 12 inches from the microphone when you're speaking which probably implies sitting down. But beyond that, it's up to you.

MR. HAMMEL: Fair enough. Thank you.

THE COURT: All right. So good morning, everyone. We're here for oral argument on the defendant, the metals company's motion to dismiss the case. And why don't we begin with defense counsel this morning?

MR. HAMMEL: Thank you, your Honor. This is a

motion to dismiss against the metals company and two senior executives.

Just briefly, TMC is a new emerging company trying to do what's never been done before which is commercially develop a metallic deposit in the sea floor to make batteries primarily for electric vehicles.

This necessarily entail risks including environmental risks which were disclosed to investors. The complaint here is based mainly on a short seller report and I think can be fairly characterized as long on generalities and speculation and short on facts. It's also short on law. Plaintiffs have not presented one case allowing similarly generic allegations to proceed past the motion to dismiss.

THE COURT: So you mention the environmental risks. Your client says in its disclosure we leave behind zero tailings and zero waste. And I don't think, plaintiffs will correct me if I'm wrong, but I don't think they argue that that statement was literally untrue. It may be that you leave behind zero tailings and zero waste but that in the process of picking up these nodules from the seabed you're ripping up and destroying complicated ecosystems in a way that's going to cause harm and maybe cause regulators not to allow you to do this.

Why isn't it a material omission to both say affirmatively we're leaving behind zero tailings and zero waste but not also cabin that statement by saying at the same time this is not a clean operation?

MR. HAMMEL: So it's a fair question, your Honor. I think the statement you're referring to was in an interview. And the company's disclosures really could hardly have been more complete around the environmental risks. I mean just again briefly, and this is at page 5 of our opening brief, we disclosed that there is significant uncertainty regarding the impact of polymetallic nodule collection on biodiversity and the CCZ and recovery rates.

Another disclosure, it may not be possible to definitively say whether the impact of nodule collection on global biodiversity will be less significant than those estimated for land-based mining. It says we may also be subject to potential risks and liabilities associated with pollution of the environment that could occur as a result of our activities. And so that was in our disclosures. That's just a small sampling. There were many more.

And so in describing what the company's goal was, because the company was also clear that it hadn't done this yet, this was a planned business proposal, that

its goal was to create a system with zero tailings and zero waste. But no investor could have been misled to think that that was a guarantee or even a likelihood that there would be no environmental risk.

THE COURT: When you purchase these licenses, what are you getting and what you not getting? Because it sounds like you may have some strain of property right in that section of the ocean floor but that doesn't mean you can just start mining. You need environmental permission. So who issues these licenses and what do you actually get with them and what do you not get?

MR. HAMMEL: So I believe the way it works, your Honor, is that a company like the metals company needs to team with a local government. This is in primarily the South Pacific.

THE COURT: So in between Mexico and Hawaii we're talking about?

MR. HAMMEL: Precisely.

THE COURT: So who's the local government?

MR. HAMMEL: I think it's some of the countries in the islands there like Nauru and Tonga which are some of the issues here.

THE COURT: Okay.

MR. HAMMEL: There is an arm of the United Nations I believe, the ISA, that I think is responsible

for the licensing. And I think you do need to overcome some environmental hurdles and other criteria in order to actually be permitted to do it is my understanding of how it works.

THE COURT: So when you get the license, you pay $42 million or whatever you pay for the license. What does that mean? That you have the -- it doesn't mean you can start mining tomorrow.

MR. HAMMEL: It does not mean you can start mining tomorrow. First, the technology needs to be developed to let you mine it. And I think the technology needs to be done.

THE COURT: But what does the license give you? I'm just speaking from a regulatory perspective.

MR. HAMMEL: I think it gives you the right, once you're allowed to do it, to a certain territory, a certain square mileage or square kilometers in the ocean floor to access these nodules.

THE COURT: It gives you the right once you're allowed to do it but isn't that the same as saying it gives you nothing because you still -- I mean --

MR. HAMMEL: No, because no one else can do it.

THE COURT: Okay.

MR. HAMMEL: It's like, you know, if you were to buy a piece of, you know, two acres --

THE COURT: Right.

MR. HAMMEL: -- in upstate New York --

THE COURT: That I understand because you're buying the land or leasing the land from a private landowner and then you still need environmental permits to go fracking or whatever you're going to do. There is no private landowner in this equation. There's only these international bodies. So you know, when they issue you the license I guess all they're saying is that you're going to be the person we're talking to about whether this process is going to be permitted or not permitted. We're not talking to anybody else about this piece of land because you reserved it but --

MR. HAMMEL: I think that's right, I think that's right. And obviously different pieces of land or seabed, you know, may be more or less likely to have a rich amount of these metallic nodules that can be harvested.

THE COURT: Okay. Can we talk about -- so the way I am looking at the alleged misstatements here is that I've grouped them into three categories which may or may not be a blunt instrument.

(Pause in proceedings)

THE COURT: So let's go misstatement by misstatement. And my rough categorization has me focused

on five alleged misstatements that relate to the pipe financing and the extent to which it was fully committed and TMC's valuation and cash flows.

Statement one is from a March 4, 2021 press release which is I think issued by both parties for the merger, right? The SPAC and the target.

MR. HAMMEL: That's right. I think technically, if I'm looking at the SEC filing, it was from the SPAC, SAOC.

THE COURT: The press release was?

MR. HAMMEL: I'm sorry, I was looking at the different document. I think you're right, your Honor.

THE COURT: Okay. So *Frutarom* tells us we have to ask not only who's speaking but which security are they talking about, the key word being about.

MR. HAMMEL: Right.

THE COURT: They say the transaction represents a pro forma equity value of U.S. 2.9 billion for the combined company which will be renamed and operate under the name TMC upon closing.

So put aside the truth or falsity of that statement for the moment. What company and what security are they talking about?

MR. HAMMEL: So this is certainly pre-merger. This is with the announcement. And I think it is the

pre-SPAC, the pre-De-SPAC TMC which is, you know, Sustainable Opportunities and DeepGreen, talking about what they expect will happen once the merger is consummated.

THE COURT: So are they talking about the publicly traded stock? That's what pro forma means to me, right?

MR. HAMMEL: I mean I think they're talking about the valuation at that time. You know, the closing doesn't happen until September. This is in March 2021.

THE COURT: Right.

MR. HAMMEL: You know, I think they're talking about the --

THE COURT: Well, what does pro forma mean to you or to the reasonable listener?

MR. HAMMEL: I mean the value of the company, the equity value, the pro forma equity. I think they're projecting out what TMC is going to be.

THE COURT: Upon consummation of the merger.

MR. HAMMEL: Upon consummation of the merger.

THE COURT: So that's a concession I think that they're talking about, the post merger publicly traded stock of TMC.

MR. HAMMEL: I mean I don't think it's completely clear. I would also say, your Honor, that on

this one, I know you didn't want to talk about the truth or falsity of it, I don't think this one is --

THE COURT: Put that aside for now.

MR. HAMMEL: -- even really contested as true or -- they don't even challenge this one as false.

THE COURT: Well, I think they're saying 2.9 billion is not a reasonable valuation if you are looking with clear eyes at the environmental risks and cash flow problems and other -- and we can debate that. I understand you disagree.

MR. HAMMEL: There's nothing in the complaint that --

THE COURT: I'm just trying to assess this from a *Frutarom* perspective. I don't think you're disputing that this statement at least relates to the company that is going to emerge.

MR. HAMMEL: That may be right, your Honor. And look, I think that if you read *CarLotz*, which is the case that applies *Frutarom* to the SPAC --

THE COURT: I have.

MR. HAMMEL: -- I think that the statements in that case that were held to be inactionable under the purchaser-seller rule are essentially the same as the statements 1 through 9 in this case. They really are. They're either pre-SPAC, pre-De-SPAC entity pre-TMC

about --

THE COURT: But was there a statement that was challenged there that was a statement of pro forma equity value of the combined entity?

MR. HAMMEL: I don't know that there was that particular statement, your Honor, but there were statements in *CarLotz* about the operations of the SPAC company, the acquisition, the company acquired by the SPAC company just as there are here statements about DeepGreen, which is the acquired SPAC company here.

THE COURT: So is it your position that that's the right reading of *Frutarom* that any time you've got a literal change in the security, new CUSIP number issued, whatever it is, that wipes the slate clean entirely. For every statement you made about the pre-change company, you get a pass because the CUSIP number has changed?

MR. HAMMEL: I wouldn't look at it that way, your Honor. And I think the way to read *Frutarom*, I would defer to Judge Abrams how she read *Frutarom* in the SPAC context because what she found is that, you know, and I'm reading, you know, "Plaintiffs thus lack standing to challenge any statement by pre-merger CarLotz about pre-merger CarLotz."

THE COURT: But it's that last phrase that I'm hung up on a little bit.

MR. HAMMEL: I appreciate that, yeah. I appreciate that. But here, just to finish the standing point and to I think answer your question about, you know, a free pass, you know, here I don't think there's any question that the two plaintiffs that are bringing this case purchased securities in post merger TMC, you know --

THE COURT: Right.

MR. HAMMEL: -- post De-SPAC. And so --

THE COURT: But could they rely then in an actionable way on a pre-merger statement about the pro forma equity value of TMC?

MR. HAMMEL: I mean perhaps. And you know, if we want to get focused just on that statement one, I would want to talk about whether it's true or false.

THE COURT: Okay.

MR. HAMMEL: But I think the statements generally pre-SPAC, you know, statements truth or not are all about DeepGreen, which is clearly the pre-merger TMC which as Judge Abrams found, you know, is not subject to that.

THE COURT: Okay. So then moving on to the second statement I'm looking at, and I think this is maybe the heart of the matter because the plaintiffs put a lot of weight on the failure of two-thirds of the

committed private capital to materialize, a statement cited in paragraph 85 of the complaint that, "The transaction includes an upsized 330 million fully committed common stock Private Investment in Public Equity at $10.00 a share." I understand you don't see anything literally false in that statement and I'm not sure I do either. But what company and what security are they talking about there? There has to be about the post merger entity, right? Because that's what the PIPE investors are investing in.

MR. HAMMEL: I mean I think they're talking about the SPAC, sustainable SAOC which is the company that needed that funding in order to acquire DeepGreen and do the De-SPAC.

THE COURT: Okay. Because the literal order of operations here is that the capital call to invest in the private, to make a private investment in public equity comes on September 3rd. It's due on September 3rd in the first instance.

MR. HAMMEL: I believe that's right.

THE COURT: And that's a little hard to call that a PIPE because on September 3rd there is no public equity -- well, I guess --

MR. HAMMEL: There is of the SOAC entity.

THE COURT: Okay. So the purchase, if you're a

private investor participating in the PIPE silo of this transaction, what you are buying is publicly traded shares of the SPAC pre-De-SPAC because the De-SPAC is going to happen the next day I think. Or when is the De-SPAC date?

MR. HAMMEL: The De-SPAC closes on September 9th.

THE COURT: The De-SPAC closes -- so can you just walk me through in a very remedial way the equity starts trading publicly on September 4th? No. What date does the equity start training publicly again?

MR. HAMMEL: The equity of the new TMC --

THE COURT: Yes.

MR. HAMMEL: -- De-SPAC entity? I'm actually not sure which date it begins trading on. The SPAC closes, the De-SPAC closes on September 9th. But again, your Honor, I would just --

THE COURT: Do you have the chronology? Actually, let me just pull this up in my -- I'm sorry.

MR. HAMMEL: And I know we're talking about *Frutarom* and *CarLotz*, but I would just emphasize there's no fact in the complaint --

THE COURT: Not false.

MR. HAMMEL: -- that shows that this is false which is kind of a predicate to any of this.

THE COURT: So there are two ways you can win this case, right? You can win on the *Frutarom* ground which is sort of hypertechnical and criticized by a large amount of securities law professors in their amicus brief to the en banc Second Circuit. Or you can just win in the traditional kind of PSLRA way of, you know, they haven't alleged falsity with the requisite specificity.

MR. HAMMEL: I would say, your Honor, that this complaint is a target rich environment for dismissal. There is any number of grounds to dismiss it. I would say the simplest and most straightforward is the traditional PSLRA ground of scienter which I'd be happy to talk about. But there's also a lack of facts establishing falsity. There is a separate standing question of --

THE COURT: And there's no order of operations that's incumbent on me to follow like the Second Circuit would want me to resolve the *Frutarom* question before the --

MR. HAMMEL: No.

THE COURT: Okay.

MR. HAMMEL: You can choose any or all. And so, you know, I would say, your Honor, just on scienter if we can talk about it for a moment, there is nothing in the -- I think as your Honor knows, you know, in the

Second Circuit there are two general prongs in which a plaintiff can establish a strong inference and it must be a strong inference under the PSLRA of scienter. One is specific facts showing a motive and opportunity to commit fraud. And the other is specific facts showing a level of recklessness that must approximate actual intent.

Here there's nothing, your Honor, in the complaint even remotely smacking of scienter. There are no insider sales of securities. In fact, the opposite happened.

THE COURT: I'm sorry to derail you. I just want to make sure I can understand the time line as best I can while I have you. Oh, I see.

So I think my understanding of the record we have is that the PIPE investors are called to fund their capital commitment by September 3rd. And September 3rd comes and goes. So as of the end of that day, the company now knows two-thirds of this private capital has not materialized on schedule. The merger closes on September --

MR. HAMMEL: 9th I believe.

THE COURT: 9th.

MR. HAMMEL: Yeah.

THE COURT: And I think the stock starts publicly trading at 9:30 a.m. on September 10th, but I

could be wrong.

The first disclosure -- what is the disclosure to the public that the called capital has not materialized. Is that also on September 9th?

MR. HAMMEL: No, that's earlier, your Honor. The company issued an 8-K on September 7th announcing that some of the PIPE funders did not follow through.

THE COURT: Does it say the proportion?

MR. HAMMEL: Yes. That's at Exhibit 8 that we submitted and it says, if I can just find it here --

THE COURT: Can we print the 8-K? Oh, I have it. I have it, I'm sorry.

MR. HAMMEL: On page 7 of Exhibit 8. And after describing the funding it says however -- I'm reading here from that page.

THE COURT: Hold on just a second. Let me get to the page. Page 6, 7, 8. What lettered paragraph are you in?

MR. HAMMEL: So this is our Exhibit 8, the defendant's Exhibit 8. And there aren't lettered paragraphs on that page.

THE COURT: Oh, I'm sorry. I'm looking at the wrong 8-K. Your Exhibit 8. Okay, I don't have that. We're going to print a copy.

MR. HAMMEL: Okay. I'll just read it through

for the record and your Honor's benefit. It says that, SOAC, and just part of it, "SOAC entered into subscription agreements with a number of strategic and institutional investors for a $330.3 million private placement of SOAC Class A ordinary shares. However, only approximately 110.1 million of proceeds from the private placement were received as of the date hereof, September 7th. SOAC intends to continue to seek to enforce the funding obligations of the non-performing investors under the subscription agreements, but there can be no assurances that it will be successful in those efforts."

THE COURT: Okay. So I'm going to put the following question to the plaintiffs but I'll give you a chance to address it preemptively. That suggests a four-day window roughly between the time when the executives know, the company knows, that two-thirds of the private capital as not materialized and when they tell the public that fact. Is anybody making investment decisions during that roughly four-day period without the benefit of that information? I think the answer is no. I think the decision -- I might call, I'm not sure about this, but I might call the decision -- you know, the investors in the SPAC have a redemption right essentially. If they don't like the acquisition, they can get back their capital at their up front cost.

But that decision has to be made by September 1st if I remember correctly.

MR. HAMMEL: I think that's right. I'll confess you may be more familiar with the intricacies of the De-SPAC than I am.

THE COURT: I know that I may be wrong but that's I think my understanding. So they've had to make that decision even before the company knows that two-thirds of the private capital is not going to materialize.

But I think this might be the best fact for the plaintiffs if there is somebody, anybody who's forced to make an investment decision purchase, redeem, whatever, not redeem, in between September 3rd and September 7th.

MR. HAMMEL: So that's not the case that they've alleged.

THE COURT: Yes.

MR. HAMMEL: The case that they've alleged in fact, and I just think it's important for the record to be very clear on this because they've said it in their complaint and they've said it in their brief that Bloomberg was the one, the Bloomberg article on September 13 supposedly quote blew the whistle on this funding issue.

THE COURT: On September --

MR. HAMMEL: 13th. That was --

THE COURT: So the 8-K, like nobody notices it basically until --

MR. HAMMEL: I think that's the plaintiff's theory.

THE COURT: Okay.

MR. HAMMEL: That's not our theory. Our theory is that the company promptly disclosed, you know, this funding issue on September 7th. And so I just don't want that to be lost in the shuffle here.

THE COURT: Yes. Let me actually add that to my timeline right now. The SPAC issues the 8-K.

MR. HAMMEL: And just to underscore it, your Honor, while your Honor is typing, this is a fraud case. The notion that anybody here was trying to deceive anybody when they disclosed it, you know, this PIPE issue was disclosed, you know, we can debate whether it should have been one, two, three days earlier --

THE COURT: Promptly, yes.

MR. HAMMEL: -- it was disclosed. I believe what was going on was they were trying to figure out whether it was really not being funded or just delayed and they took a little bit of time to do that.

THE COURT: Well, when an institutional investor has missed a capital call, that's a pretty good

sign that something is amiss.

MR. HAMMEL: Not a good sign, correct. And there's obviously litigation about that now.

THE COURT: Yeah.

MR. HAMMEL: But your Honor, just to maybe go back to where we were, and I'm happy to talk about the purchaser-seller or the De-SPAC, but you know, the traditional bases for dismissal in this case sort of cry out for dismissal. On scienter, there's no insider sales. The insiders increased their holdings dramatically during the period, didn't sell during the period. You know, the case law is very clear that when that happens, it is contrary to an inference of fraud.

The only allegations of motive they had have to do with attracting investors and needing capital, but that's true of every early stage company. And the Second Circuit has been abundantly clear that general allegations of motive aren't enough.

THE COURT: What are the statements as to which you're relying on the short seller report as an alleged corrective disclosure?

MR. HAMMEL: We don't believe the short seller report is a corrective disclosure. We believe the short -- in order to be a corrective disclosure, a corrective disclosure is something the plaintiff needs to

establish to show that the alleged misstatements that they are asserting happened were eventually correct that it impacted the stock price. So the quote/unquote truth came out.

THE COURT: Right. I thought that you had said look, by the time one of the more of the plaintiffs have made their investment decisions there has already been a corrective disclosure and therefore they can be relying on the --

MR. HAMMEL: So on the standing argument, the first standing argument -- the *Frutarom* one is the second standing argument. The first standing argument is that these plaintiffs purchased on September 21 and 22 of 2021. That's when they bought their stock. They --

THE COURT: September 21 and 22?

MR. HAMMEL: September 21 and 22. The two plaintiffs purchased on those dates.

THE COURT: Hold on. Okay.

MR. HAMMEL: So that's when they bought for the very first time. They allege that a number of statements, what we've called statements two through six, were revealed to have been false a week earlier on September 13th with the Bloomberg article.

THE COURT: So you're saying in their framing this would serve as a corrective disclosure but you're

not --

MR. HAMMEL: In their framing. And of course you don't have a fraud claim if you know the truth when you bought. Like that's just common sense. Of course the law follows from that.

THE COURT: Okay.

MR. HAMMEL: But you can't have a claim, you can't claim that you were defrauded if you've been told the truth.

THE COURT: All right. So you're not saying this was a corrective disclosure. You're just saying by their logic this would have --

MR. HAMMEL: Right. On their pleading they do not have standing to bring a claim on statements two through six.

And just to pause on that, your Honor, because they obviously address that in their briefing, they've got an argument and they cite a few cases around the idea that if statements are in interrelated there can be standing. All of their --

THE COURT: If statements are? Say that again?

MR. HAMMEL: The plaintiffs make an argument, Mr. Ludwig will make it for himself I'm sure, but the plaintiffs make an argument that they do have standing because they say that the statements that they are

challenging as false our all into related and so courts give them sort of leeway to be able to have standing. That's what they say.

I just want to point out that the cases that they cite do not have this fact pattern. None of them involve a plaintiff who purchased after the truth was known. They all involve plaintiffs who purchase before the truth was known and could legitimately claim that they were misled.

THE COURT: I mean I don't understand precisely how a short seller report or a Bloomberg article can function here as a corrective disclosure but we'll hear from the plaintiffs --

MR. HAMMEL: We would agree with that, your Honor.

THE COURT: -- on that subject.

MR. HAMMEL: Yeah. So just on scienter because it is I believe the clearest way for your Honor to dismiss. I've talked about there being no motive. Plaintiffs cite I think one case in their mode of argument, this case by the name of *Shanawaz, S-H-A-N-A-W-A-Z* for the idea of attracting investors being enough to have scienter. That case doesn't actually say that. That case had confidential witnesses, that case had a lot of other things around scienter.

And I would just point your honor to another case, a recent Second Circuit case. I can put this in writing if you'd like. But I'll spell it just for the record because again, it's a complicated name. It's *Nandkumar* N-A-N-D-K-U-M-A-R *v. AstraZeneca*. The cite's 2013 WL 3477164. The plaintiffs there alleged that there was a motive, AstraZeneca had a motive to artificially increase its stock price in order to fund the specific acquisition. You know, so there was, even more than here, a specific reason to artificially increase the stock price. And the Second Circuit said that's not enough which is just consistent with long-standing Second Circuit law.

THE COURT: So what was sufficient as a motive?

MR. HAMMEL: You know, in theory a sufficient motive could be an executive selling a substantial number, an unusual number of shares during the class period in advance of a negative disclosure that causes the stock to decline.

THE COURT: You're saying, and I don't think anybody would seriously dispute this, that the general incentive that every CEO has to see his stock price appreciate is insufficient --

MR. HAMMEL: Right, because everybody would have scienter.

THE COURT: Right.

MR. HAMMEL: That can't be the law and it's not the law.

And then just moving away from motive and into the other prong of scienter, your Honor, you know, the sort of extreme recklessness, they talk about general access to documents and information. That's not enough. They talk about signing SEC filings. That's not enough. And I think they make maybe their most significant scienter argument on this core operations idea. The idea in core operations being the theory. It's never been accepted by the Second Circuit I would emphasize. But the theory that plaintiff sometimes used say if you're a company that sort of just has one business, like you're a single product company, and there's something dramatically wrong with that product, the CEO and CFO and the senior executive must have known, right? Because what else do they do. It's a core operation of the company. How can they not have known? So it's a presumption that at times gets applied in the scienter area.

Again, the Second Circuit's never embraced it and district courts in the Second Circuit, even when they've sort of relied on it a little bit, it's never been the sole basis on which they've found scienter. And

that's even true in the cases that the plaintiffs cite on page 19 of their opposition brief. They cite this *Agean* case where core operations was the secondary basis for finding scienter. The primary basis was the CFO sold $1 million worth of shares. The *Salix* case provided quote cooperations, provided quote supplemental support for scienter. There were other bases. The *Avon* case, core operations was quote additional support.

All of which is a long way of saying, your Honor, that they don't have anything for scienter here. And under *Tellabs*, the Supreme Court's decision in the *Tellabs* case which is its most recent teaching how courts are supposed to evaluate scienter. The district court in assessing complaints is supposed to be required to assess not just the fraudulent inferences that the plaintiffs ask them to take, but the non-fraudulent inferences and determine which is more compelling.

And here I think the only reasonable, much less compelling, inference is that TMC was a startup company trying to do what's never been done before with sea floor mining and was targeted by a short seller and its financing didn't come through and its stock dropped. That's not securities fraud.

THE COURT: What's the date of the short sale report again?

MR. HAMMEL: The date of the short sale report I think is --

MR. LUDWIG: October the 6th, your Honor.

MR. HAMMEL: October 6, 2021. Thank you.

THE COURT: October 6th?

MR. HAMMEL: Yes. And just to wind up on scienter, this isn't even in the ballpark of the sort of complaint that would survive a motion to dismiss on scienter grounds under the PSLRA.

I can turn to falsity if your Honor would like briefly because we talked about it a little.

THE COURT: Can you just talk about falsity on the asset valuation, the value at which TMC is carrying the licenses?

MR. HAMMEL: Sure so I think this is the TOML assets valuation which pertains to statements seven and eight. So plaintiffs allege that we paid $43 million for it. Sorry, we valued it at $43 million on the TMC S4 in 2021. And plaintiffs claim that that's 10 times the purchase price. That's at paragraph 54 of the complaint. In fact, and they acknowledged it elsewhere, we paid $32 million for it. That's I think at paragraph 93 of the complaint. And I think it's also on their opposition brief at page 6. They acknowledge they were paid 32 million.

THE COURT: Paid 32 million.

MR. HAMMEL: Yes.

THE COURT: Valued it at 42?

MR. HAMMEL: 43.

THE COURT: 43?

MR. HAMMEL: Yes.

THE COURT: How do you get from 32 to 43?

MR. HAMMEL: So a year past and it was done -- it's actually an accounting judgment comparing it to other properties in the CCZ. Even the complaint acknowledges that the TOML has more than doubled the resources of other areas, that other areas were taken. And so, you know, it's an accounting judgment and I would say a couple of things about that, your Honor. You know, plaintiffs have alleged nothing to show that 43 million was improper other than saying it>

THE COURT: Well, they're saying they think it's worth zero.

MR. HAMMEL: Right. And I would point out that these are audited financial statements.

THE COURT: That's a question I have. What do the auditors actually do and not do with respect to the valuation?

MR. HAMMEL: I mean I don't know what they do in terms of their ticking and tying on the accounting but

it's part of the audit. Ernstein audited the financial statements and --

THE COURT: But you don't know -- I would have suspected that the auditor's audit letter would carve out the valuation of this license or maybe say something very limited like we looked at the process by which they've valued this and their process is generally sound, but not -- the auditors are not saying we think this is worth $43 million.

MR. HAMMEL: No, and our --

THE COURT: And I think they're probably being affirmatively direct in saying that that's not what we're saying.

MR. HAMMEL: I don't know what that level of granularity, what the audit letter says, your Honor. But one thing that is clear is that valuations in the law is clear in the Second Circuit. Valuations are opinions, not an exact science. And pleading they're false requires facts showing that they're both objectively wrong. Like it's just wrong, but also subjectively wrong.

THE COURT: We're going to given the plaintiffs, but they say something like the party from whom TMC bought these licenses, or TMC's precursor bought these licenses, had shopped them for some long period of

time and there were no bidders and TMC knew it. I don't know how the say TMC new it exactly. We'll hear that part from them. But why wouldn't that be sufficient if they know like this thing was on the market for years and then literally nobody else showed up with any interest in it besides us.

MR. HAMMEL: I mean why one party values something higher than another party, you know, is anybody's guess. At the time when that was being shopped, and it's not clear to me how far in the past that was happening, you know, maybe companies didn't believe, unlike TMC who does believe, that they're going to have the technology and wherewithal to actually value this or make use out of it.

But one thing I would just point out, your Honor --

THE COURT: Sorry, but so they -- the thing that you know is that they bought this thing at 32 and they had it marked a year or so later at $43 million. There's nothing in the record I take it one way or the other to suggest the basis for that increase in their carrying?

MR. HAMMEL: Not quite, your Honor. I think that there is no basis in the record other than, you know, what you pointed out about at some earlier point in

time people not -- that it being shopped around. But there aren't --

THE COURT: No, but now I'm saying like no basis to support the increase. It's not like you're saying, Judge, look at this other transaction that happened a year later that shows -- marking something from 32 to 43, that's $11 million on a $32 million base, so 35 or so percent increase in one year. That's a pretty nice return on your investment. Where does that come from?

MR. HAMMEL: So I would say, your Honor, a couple of things. One, you know, just to step back, in this context it's not our burden to show that it was right.

THE COURT: I know.

MR. HAMMEL: It's their burden to show it was wrong. So I just want to be sure we're clear about who has to --

THE COURT: Well, but to say they marked this thing up 35 percent --

MR. HAMMEL: Right. And of course, you know, on a 12(b)(6) motion, you know, we're limited to the complaint and some other documents. But I would say if you read paragraph 112 of the complaint, paragraph 112, they quote extensive, or they quote a couple of

paragraphs from a call with the defendant Barron, you know, TMC's CEO, where he's explaining it. And he does explain that some of the bases for the $43 million valuation and the $32 million valuation. Plaintiffs of course won't agree with that. But I would say that they've not alleged that those reasons are false. And so on this context, the fact that the other good ground and the CCZ has already been taken so that by the time they bought it for 32 and over time it was more exclusive, you know.

And so anyway, I would just point out that they have been shown that the $43 million is objectively wrong. But even if they did, your Honor, and this is important, even if they did show that $43 million cannot be justified as a matter of accounting or mathematics, which they've not done, but if did, even that's not enough because it's clear that it's an opinion and that has to be subjectively false. The defendants have to be shown to have actually not believed it's true.

And you don't have to take my word for it. It's the Supreme Court that has said it in *Omnicare*. And I'm just going to read briefly from 575 U.S. 194. The Supreme Court said, "To be specific, the investor must --" In order to show an opinion is false. "To be specific, the investor must identify particular and

material facts going to the basis for the issuer's opinion, facts about the inquiry the issuer did or didn't conduct or the knowledge it did or did not have. That is no small task for the investor." That's what the Supreme Court has said.

They haven't come close. Even if we could entertain an objective falsity argument, which I would submit they haven't provided a basis for, there's nothing on the subject of falsity so they can't base a claim on that valuation.

THE COURT: Okay.

MR. HAMMEL: So your Honor, I would just say, you know, I think we talked about the PIPE funding, you know, statements two and five, statement 11, this idea that we were lying to the market when TMC said it would be pursuing a litigation. You know, I would submit that that one is kind of silly. You know, there was federal litigation. It turned into state court litigation.

You know, the environmental impact statements, we talked about the disclosures. Here I would just say that they've got no specific facts showing that any of our environmental disclosures was wrong. You know, they have of course statements in the Bloomberg article which was on its face an opinion piece. They've got statements from the, you know, some statements I think in the short

seller report about what environmentalists claim. But we never promised that there would be environmental consensus on sea floor mining. We were quite clear that there were environmental risks. And the securities laws don't require a company to only pursue noncontroversial businesses. It requires us to disclose what the business does and the risks, and we did that. But the fact that some environmentalists were opposed to sea floor mining doesn't show that anything we said was false.

Briefly, your Honor, they have statement nine on the exploration expenses. I think it's fair to say that they have dropped that one. It only gets a mention in a footnote in their opposition brief. And what they say there is that we didn't publish out $35 million expense number until after the short seller report. That's not true. It was published in our S4 in August of 2021. That's at Exhibit 2 at page F-61.

THE COURT: All right. Let me ask you to pause there. Let's hear from the plaintiffs who've been waiting patiently and we'll save some time for you in rebuttal.

MR. HAMMEL: Thank you.

MR. LUDWIG: Well, your Honor, I'll start off with the statements regarding the funding.

So the statement fully committed by defendants

we think is fairly self-explanatory. It's something an investor would rely on.

THE COURT: But why is it false?

MR. LUDWIG: Because defendants did not do their due diligence and in effect --

THE COURT: What due diligence?

MR. LUDWIG: I'm referring to prior to the reneging by the funder. So --

THE COURT: What due diligence do you say they had some legal obligation to do but didn't?

MR. LUDWIG: So your Honor, I know that this came up in the complaint. There's a state court case that's currently pending. What happened was defendant said that he funding was fully committed. When the funding didn't come through, they said they would recover it.

THE COURT: Can I just stop you and make sure I understand the baseline allegation? And then we can get into the question of what to make of them. The defendant says in addition to the SPAC financing, which is relatively unstable because the investors have a redemption right that they may or may not exercise, we also have this PIPE transaction which is fully committed. We've got binding -- I take fully committed to mean we have a binding and enforceable contract obligating

private investors to put this money in. You're not disputing that that was true that they had binding contracts?

MR. LUDWIG: I'm not disputing that the contract itself was binding but --

THE COURT: You're saying they should have done some due diligence that would have revealed that these investors were not going to come through with the capital they were committing?

MR. LUDWIG: Well, your Honor, there have been state court litigation and there's a recent opinion that came out in March 2023 after we submitted all of our filings in this case and so it could not be included either in our complaint or in the brief. I would like to hand up a copy if possible.

THE COURT: You can hand up a copy but I'm not going to read it here.

MR. LUDWIG: Certainly not.

THE COURT: Tell me what the significance is.

MR. LUDWIG: But there's litigation against some of these funders and in ruling on their motion to dismiss the state court said, and I'm quoting here from the opinion, "Your client had the ability to engage in some kind of due diligence to determine whether or not they needed guarantees, personal guarantees, or to

determine whether they need a letter of credit but chose not to do so. This Court is not he place to come in and say we messed up before, we didn't take due diligence steps, appropriate steps and due diligence and then to say now we need the Court to assist us because of our prior failures."

THE COURT: Sorry, what is the Court holding here? They're dismissing the state court complaint?

MR. LUDWIG: They're not dismissing it. They're allowing certain of the allegations against the funders to proceed into discovery on a breach of contract hearing but rejecting a tortious interference theory. But this is a discussion about the underlying arrangements between TMC and the funder.

THE COURT: But aren't you arguing that when TMC says this money is fully committed, that somehow implies that they have letters of credit that they don't have or that they have personal guarantees they don't have? I don't understand. You said a minute ago they should have done some due diligence that they didn't do. Now by reading the state court opinion I think you're suggesting they should have gotten additional contractual assurances that they didn't get. But what is the problem with them saying --

MR. LUDWIG: It seems they didn't have

assurances from the outset. And you know, paragraph 103, defendant Barron said -- sorry, paragraph 104, defendant Barron says, "It wasn't that they chose not to fund, they couldn't fund, they didn't have the money." And this is a fact that comes up repeatedly in the state court case as well but --

THE COURT: The investors are private funds. Right? You pulled the --

MR. LUDWIG: There's an individual -- are you talking about my clients?

THE COURT: No, the private investors who don't follow through on their --

MR. LUDWIG: They're private investors, yes.

THE COURT: Have those funds failed? Like what makes you think they really didn't have the funds/

MR. LUDWIG: I'm not saying what the facts were on their side. I'm saying what --

THE COURT: Well here's what I recommend to you by way of sort of ordering your oral argument. You can take this recommendation or not. Start with what you think are the most objectively demonstrably false statements and tell me here's how we know that this statement was false. Do you think that the claim that the private funding was fully committed is the most objectively and provably false statement they made?

MR. LUDWIG: I do, your Honor.

THE COURT: Okay. So that's why we're starting with that.

MR. LUDWIG: Right. We do think that. We think that's substantiated not only be the state court case but also the sequence of events after that funding failed.

THE COURT: What should I as a judge, if I were to understand how to think about the phrase fully committed, what does it mean when defendant's executive says this money is fully committed and what does it not mean? Where should I look to understand that. To the dictionary definition of the word committed?

MR. LUDWIG: I think we should look to what a reasonable investor would understand under the circumstances which is really the touchstone of the PSLRA and --

THE COURT: My intuition, which may or may not be worthwhile here is that a reasonable investor would think fully committed means contractually bound.

MR. LUDWIG: Right.

THE COURT: Tesla, we all know just from reading the newspapers, has some SEC problems when the CEO said in a tweet I think something like thinking about taking --

MR. LUDWIG: It was a tweet, your Honor.

THE COURT: -- company private funding secured. Right? Something like the phrase funding secured was the phrase alleged to be problematic. And the argument from the plaintiffs in that case, and I don't remember what the courts had to say about it one way or the other, but the argument from the plaintiffs was your funding was not fully secured because you didn't have a contract with anybody. You had a conversation with somebody at some investment fund. That's not secured funding.

This is different, right? They had a binding contract. You don't dispute that. They made it past the motion to dismiss phase in state court on their breach of contract action. You know, help me help you. What is the source of authority for the proposition that the reasonable investor would understand fully committed to mean something more than we have a binding contract and include things like we have a personal guarantee or we have a letter of credit. If they had a letter of credit, they would have said we have a letter of credit. Instead, they said this funding is fully committed.

MR. LUDWIG: And as it turned out, your Honor, that funding was not fully committed in the sense that --

THE COURT: People breach contracts every day but that doesn't mean that somebody hadn't made a

commitment. They did make a commitment.

MR. LUDWIG: I think what we've alleged in the complaint and what's come out in the subsequent years is that there really wasn't a mechanism for defendants to secure that funding once there was a failure by the funders to tender. You know, they initially --

THE COURT: The mechanism to secure after a failure is litigation. You have a binding contract. You've got to sue somebody for breach of contract.

What's your second most objectively provably false representation here?

MR. LUDWIG: I think this statements regarding the environmental impact would be our second most provably set of false statements. Now, I know the defendants have attempted to re-characterize those as opinions, but the statements that they've made here are about the immediate impact of what the technology will do. And there really wasn't a way for investors to fact check that. They had to rely on the company's misrepresentations. And as it turned out, it really wasn't an issue with a few environmentalists.

THE COURT: Am I right on that statement that you kind of put front and center in the complaint that where they're saying their process leaves no tailings and no waste, are you contending that that statement is

literally false or that they omitted to say something else that they should have said alongside it?

MR. LUDWIG: I think that statement, we're not alleging that that statement was literally false. We're alleging that what they did there was to present a misleading picture for investors. And I think that has to be considered.

THE COURT: Misleading because they omitted to say what alongside it?

MR. LUDWIG: That there's this substantial problem of environmental damage and risk that prompted 500 scientists to come out against deep-sea mining that prompted the large corporations --

THE COURT: And why is the disclosure -- the risk factor disclosure says look, we don't really know how much we're going to rip up the seabed here and cause harm. It doesn't use that informal phrasing, but something to that effect. Why isn't that the context that you say has been materially omitted?

MR. LUDWIG: There's a case, your Honor, a Supreme Court case called the *Matrixx* case which we do --

THE COURT: Called? I'm sorry, I didn't hear you.

MR. LUDWIG: The *Matrixx v Siracusano* case. A company essentially tried to say, as defendants do here,

that whatever the quality of their statements, they really couldn't be verified. They really weren't objective in any sense. And the Supreme Court rejected that. When a company comes out and makes statements about their environmental impact, they can simply fall back and say these are not actually, they're not true and they're not false. They occupy some nebulous ground in between.

THE COURT: Is the fact pattern of *Matrixx* -- I think I may be remembering the case you're talking about. Is the fact pattern there that the company is actually destroying the environment at the same time they say we're not sure, we might have some negative environmental impact?

MR. LUDWIG: Well, it had to do with the effects of a pharmaceutical --

THE COURT: Oh, no.

MR. LUDWIG: It's not an environmental case. My point is that the same logic that defendants are using where they can make these statements about, for example, that deep-sea mining will lead to a significant reduction in the ESG footprint of metals and will dramatically reduce the environmental bill of the transition to green energy. We itemized these statements here and they're not statements that say well we'll see what happens, we

don't know. We're speculating that that might happen. And what they're doing is presenting a series of factual statements to investors and then attempting to hedge with separate risks statements well you know, maybe that's not going to be the case. Maybe it's not going to work out that way.

But that's not the way that their statements are phrased. And so what we contend is that they don't deserve the benefit of the doubt as uttering opinions when that's not what these statements are regardless of whether the operations themselves have already occurred or whether they're going to occur in the future. The nature of the environmental effect of deep-sea mining are statements that the company is quite comfortable in making in the here and now including defendant Barron.

THE COURT: What's the answer to my question about whether anybody is making purchase decisions September 3rd when the company knows that the committed capital has not shown up and pre-September 7th when I understand the 8-K disclosing that is filed? Is there anybody making any investment decisions during that period? I think the answer is no because the deadline to say I'm redeeming, I want out of this deal, is September 1st. Right? So at that point the company is not lying about anything because they don't know yet that the

committed capital has vaporized.

MR. LUDWIG: My inclination, your Honor, is to say no but I think we also say that the problems with the funding and the way that it was represented as fully committed, those issues stem back before September 3rd. I think it's defendant's framing that they want to say there was no problem, there was no issue here until suddenly something happened on September 3rd. And I think that's where the state court opinion is instructive in that it goes into the fact that defendants really didn't have a mechanism to deal with the possibility of the funding not coming through and as we've alleged --

THE COURT: Again, the mechanism is you sue the person who breached that contract and that's what they did.

MR. LUDWIG: Well, they misrepresented that as well, your Honor, as we went into in the complaint. They initially filed the case in federal court that was summarily --

THE COURT: Yes. Invoking the court's diversity jurisdiction.

MR. LUDWIG: So that was dismissed.

THE COURT: Did the court dismiss or did the court just order the parties to show cause why the case shouldn't be dismissed?

MR. LUDWIG: They ordered the parties to show cause and then the case was subsequently dismissed.

THE COURT: Dismissed by the court or voluntarily dismissed by the plaintiff?

MR. LUDWIG: I believe it was voluntarily dismissed by the plaintiff after --

THE COURT: Okay. So the court's not dismissing. Either way, that's a diversity problem when it turns out you got plaintiffs and defendants from the same state. So they re-file in state court and then the case is up and running.

MR. LUDWIG: Well the court here takes pains to stress that there's a very low bar for overcoming the motion to dismiss and says that on summary judgment the Court won't be as forgiving. That's a very low standard at the motion to dismiss stage, that summary judgment is another question, and that the Court won't be as forgiving. And so this is a very --

THE COURT: Won't be as forgiving with what?

MR. LUDWIG: What they perceive is the issue with the plaintiff's allegations. But I think for purposes of our complaint not to substitute ourselves for the plaintiffs in that case is that defendants are sort of flailing in an attempt to recapture some of these funds and at the same time they're not telling the market

the truth. So for example, on March 25, 2022 they say that this case, the one we're in court in right now, is the only material litigation that the company's involved in. And I would say that a case involving $20 million is material litigation. It's treated as such by the state court. That isn't corrected until after we file our papers. And then TMC begins to reveal that they have a case pending but they don't tell investors that they already had a federal case dismissed and that they had to re-file in the state court. So there were additional ups obfuscations regarding the remedy for this breach and, you know, very little reporting on what the sequence of events has been since they had to file a case, what the Court said other than the case is proceeding into discovery so investors have consistently been kept in the dark on this.

THE COURT: Okay.

MR. LUDWIG: I think on the issue of the TOML license, we're seeing defendants claim that there's no basis to contest the valuation that they've made yet counsel he admitted that the auditors haven't explained the process. Opposing counsel doesn't know. Yet we've alleged that there's an extremely low value attached to this license, that there is an inexplicable increase in the price paid for it compared to what it was valued at

before, compared to comparable prices, and that has not been explained by defendants. So when they say there's no facts alleged as to why that was overvalued, that's really projecting because they're not able to tell us --

THE COURT: If they had really paid $32 million in a truly arm's length transaction, that would be a pretty good indicator that that's a reasonable valuation. You sort of allude to the idea that this was really not an arm's length transaction and that there is some affiliation or some aspect of self-dealing in the initial purchase. But I don't think I understand the precise nature of that.

MR. LUDWIG: That's correct, your Honor. And I think you asked opposing counsel that, why was there a --

THE COURT: You may need to get a little closer to the microphone.

MR. LUDWIG: I'm sorry. Why would DeepGreen have known what the correct valuation was? And I think that's answered --

THE COURT: Well, what is it you're saying about why this was not a truly arm's length transaction?

MR. LUDWIG: We're saying that there was a pre-existing relationship.

THE COURT: What is the nature of that pre-existing relationship?

MR. LUDWIG: It's at paragraph --

THE COURT: I think it's paragraph 53 of the complaint.

MR. LUDWIG: Right. We allege that there was a previous relationship between, pre-existing relationship between DeepGreen and NMI, which was the previous holder of the license.

THE COURT: You cite "Canadian court documents," that in your view revealed an existing ongoing relationship between the seller of this license and DeepGreen since 2013 and you say that this relationship was via a mineral royalty deed which included both TOML and ORI and DeepGreen. And I could understand that in a lot of different ways. One is just as a suggestion that they own some asset in common. Right? Whatever this mineral royalty deed was that's revealed in these Canadian court documents, the deed shows them as co-owners. But I can own things in common. It doesn't really render this kind of self-dealing on its face. Right? Two investors might come together and by license just because it's more expensive than either of them can afford. So they're joint venture partners in respect of that license. But they're not then affiliated in some way that would give either or both of them an incentive to overpay the other in a totally unrelated

transaction. It's not like you did a transaction with your brother-in-law or something weird beers some reason on the face of the transaction to believe that you were lining your own pockets when you were paying somebody else an inflated price.

MR. LUDWIG: What we're saying, your Honor, is that there's reason to believe that TMC understood the true value of the license based on their previous relationship with the previous license holder, the holder of that license. And so your question to opposing counsel was well why would they know that?

THE COURT: I think you're skipping some steps in the logic there. So they have this pre-existing relationship, whatever it is, that they own a mineral royalty in common. You're saying that that relationship somehow gives rise to knowledge -- you're not saying -- is the mineral royalty deed that we're talking about in paragraph 53 the same license for which TMC pays $32 million or is that something else, or we don't know?

MR. LUDWIG: No, that's a different document.

THE COURT: Okay. So they own this mineral royalty deed in common and you say that gives TMC a basis to know that the true value of the TOML license that they later pay 32 million for, the true value of that is zero. How?

MR. LUDWIG: We said that it was previously valued at zero and we said that comparable licenses are valued at $250,000.

THE COURT: How do they know that somebody else is carrying it at zero? And why would it be valued at zero? Like if there's really -- well, start with the one discrete question of who's valuing it at zero and what evidence is there that the defendant knew of that valuation?

MR. LUDWIG: We're saying that NMI, the previous holder, valued it at zero and we're saying that the evidence that defendant knew of that valuation was the previous relationship between the two companies that went back to 2013. And these are not large complex companies. These are both small entities focused on the exact same planned operation of deep-sea mining.

THE COURT: I just don't understand the logic. Like let's say you and I are two parties engaged in real estate investing and we buy house A in common fifty-fifty. Years later I say to you hey, I have this other property, do you want to buy it from me? And you say yes, I'll pay you $1 million for that house. And assuming for the purposes of this analogy that for whatever reason I'm carrying this house on my books at zero. Maybe I know it has a termite problem or

something. You're saying that the fact that we own house A in common is a logical reason why you would know that on my balance sheet on carrying house B and zero? I don't understand. We're not affiliates. We're not privy to -- if I'm a private company and I don't have to publish my balance sheet in SEC filings, why would the fact of our owning some other asset in common give you access to my private financials?

MR. LUDWIG: I don't think I'm saying that I would have access to your private financials. I'm saying that it's difficult for me to characterize myself as an unwitting buyer from you when I know that we've had a previous relationship, previous commercial relationship.

THE COURT: We're still arm's length parties though. There's nothing in your allegations that really suggest an affiliate relationship other than that we've owned one asset in common in the past. Okay.

How do we know, even as we sit here today, that the prior owner carried this at zero? We know that from the short sellers report?

MR. LUDWIG: It did come out in the short sellers report and then also we verified --

THE COURT: What does the short seller say is its source of that information?

MR. LUDWIG: Court documents in Canada.

THE COURT: Okay. And what -- okay.

MR. LUDWIG: There are public documents to that effect. And further, if you look at paragraph I believe 103 of the complaint, 104 --

THE COURT: Do you know whether --

MR. LUDWIG: -- where defend -- sorry.

THE COURT: I don't think court documents in Canada are really public within the SEC's very narrow definition of what constitutes public information. But even if we were to assume that they are public, do you know when those Canadian court documents appear on the Canadian court's docket?

MR. LUDWIG: Not the precise date, your Honor.

THE COURT: Well, do you know if it's before the purchase of the license here or after?

MR. LUDWIG: My understanding is that it was before, that those weren't -- that the information about the zero valuation didn't come to light publicly after DeepGreen had purchased the TOML license.

THE COURT: So why would they paid $32 million for something worth zero if the whole world knew because of this Canadian litigation that the seller was carrying it on its books at zero? What's even your theory about that?

MR. LUDWIG: I think our theory is that they

overpaid for it through either a related party transaction that we're not privy to at this point because we're only at the pleading stage, or because they wanted to enhance the perceived value of their operations and by paying more for the license, you're able to go out and say look, this is worth much more than a comparable license and therefore TMC is able to attract more investment on that basis.

THE COURT: Okay. But on the question of why you think they're related parties, the most we can say is that there's this mineral royalty deed that shows them as co-owners.

MR. LUDWIG: And I'd also emphasized, your Honor, that this is a small world of companies that are doing this. This is not hundreds of companies that are out there --

THE COURT: Yes, but that doesn't -- a smaller number of companies in the industry doesn't make them more or less related to each other. They might be more aware of each other's existence, but the question is why you think they're related parties.

MR. LUDWIG: I said that that might be a possibility for the transaction. I'm not saying that they were related parties necessarily in 2013 other than having this arrangement between them. But we haven't

been able to get an answer for why a company valued the TOML license the way that it did. It doesn't make sense based on all of the objective facts. We've had defendant's counsel say that he doesn't really know either. And so we think that it's an improper and inflated valuation based on what we know and based on the facts that are pled in the complaint on it.

THE COURT: Okay. All right. Let me give you three minutes in which to wrap up and then the same amount of time to the defendant's rebuttal.

MR. LUDWIG: I'd like to emphasize defendant's statements about scienter are incorrect in that they've attempted to posit a theory to the Court that we're required to plead motive which isn't necessarily the case. They've described cases in which motive wasn't considered as a sole basis as though that was an outlier when, you know, scienter allegations are supposed to be considered holistically. And we allege in the complaint that defendant Barron spoke to --

THE COURT: Why don't you have a Section 11 claim? Just for my edification. You're not bringing a Section 11 claim?

MR. LUDWIG: We don't have a Section 11 claim at this point. I'm not saying we wouldn't bring one.

THE COURT: You're not saying you wouldn't or

you're not saying you would?

MR. LUDWIG: Well, I don't want to foreclose it here at the hearing that we would never plead a Section 11 claim.

THE COURT: Because Section 11 obviously requires you to prove falsity but not scienter.

MR. LUDWIG: Well, we think scienter is pretty readily available here. Defendants have characterized us as not having motive. First of all, we do have a motive in that TMC itself said is specifically needed $7 billion to engage in large-scale production. But more importantly, there are specific allegations in the complaint where defendant Barron speaks to the precise issues that we've alleged to be false. He holds himself out as an authority. He speaks to the funding of the company. In paragraph 104 he speaks to the issues underlying the failure to receive funds. Paragraph 91 and 92, he speaks to the environmental issues that we alleged to be false. And so this is the CEO of the company holding himself out as having knowledge of these issues that were the core operations of the company.

And by the way, there's no Second Circuit decision ruling out application of the core operations theory in the Second Circuit. That certainly applies here. And I think defendants have mistaken the idea that

they're competing inference is held equally to the allegations in the complaint. And we did refer to their judicial notice tactics, for example, introducing stock purchases in Exhibit 7 that were not alleged in the complaint including unauthenticated stock charts to actually rebut the complaint allegation which is improper at this phase.

THE COURT: A stock chart?

MR. LUDWIG: Right.

THE COURT: Courts can't take judicial notice of closing prices of publicly traded stocks?

MR. LUDWIG: Your Honor, courts can certainly take judicial notice of publicly traded prices of stock. What defendants provided to the Court was an unauthenticated document. And the reason that they provided it was not to say look at this, these purchases happened when we say they did. The reason they provided it was to rebut our motive allegations. And the point is that that's not the way that the Court is supposed to view scienter at this stage.

THE COURT: Okay. All right. Three minutes or so in rebuttal.

MR. HAMMEL: Yeah. Your Honor, I would just say a couple of things. One, counsel spent a bit of time talking about statements in 2022. I wasn't quite sure I

understood the relevance of them. But as a matter of law, post class period statements are irrelevant. So I think he was talking about the description's that the company was making of litigation against the funders and it had something to do with showing that back in 2021 they knew or should have known that the funders weren't going to fund and follow it. But it's after the class period, so it just doesn't matter. So that's one point.

I think the last point counsel made is that we submitted Form 4s filed with the SEC showing that the two individual defendants had acquired stock but never sold stock. And I think counsel just said that the Court's not supposed to consider that. That's just not correct as a matter of law as I think your Honor has held in other cases including the *HDFC Bank* case a couple of months ago. Public SEC filings are well within the Court's discretion to consider. And of course without Form 4s which disclose shareholder or insider transactions in company shares, without those courts wouldn't have been able to make the kinds of rulings they've made that we've cited showing a lack of scienter where executives have acquired stock.

And then the last thing I would say is on this question of whether a valuation of $43 million after a purchase of $32 million, which I think is now fully

conceded that we paid $32 million, again, it's not our obligation here to justify it. But if your Honor wants to understand the CEO's reasoning at least in the little bit that the plaintiffs have provided you, I would point you towards --

THE CLERK: Microphone, counsel?

MR. HAMMEL: Sorry. If your Honor wants to read the CEO's rationale around that, I would point your Honor towards paragraph 112 of the complaint where there's a quote.

And with that, your Honor, I would just say this case cries out for dismissal on a number of grounds and we urge your Honor to do that.

THE COURT: Okay. Thank you, all.

MR. LUDWIG: Thank you.

MR. HAMMEL: Thank you, your Honor.

THE COURT: I'll take the case under advisement.

(Matter concluded)

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C E R T I F I C A T E

I, MARY GRECO, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this **14th** day of **July**, 2023.

Mary Greco

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